

**COUNTY OF SAN LUIS OBISPO BOARD OF SUPERVISORS
AGENDA ITEM TRANSMITTAL**

(1) DEPARTMENT County Counsel	(2) MEETING DATE 9/9/2014	(3) CONTACT/PHONE Erica Stuckey, Deputy County Counsel / 781-5400	
(4) SUBJECT Presentation of options for an ordinance regulating the exportation of groundwater. All Districts.			
(5) RECOMMENDED ACTION Review the options and provide direction on preparation, content and future action for an ordinance regulating the exportation of groundwater.			
(6) FUNDING SOURCE(S) County Budget	(7) CURRENT YEAR FINANCIAL IMPACT \$0.00	(8) ANNUAL FINANCIAL IMPACT \$0.00	(9) BUDGETED? No
(10) AGENDA PLACEMENT { } Consent { } Presentation { } Hearing (Time Est. ____) { X } Board Business (Time Est. <u>120 min</u>)			
(11) EXECUTED DOCUMENTS { } Resolutions { } Contracts { } Ordinances { X } N/A			
(12) OUTLINE AGREEMENT REQUISITION NUMBER (OAR) N/A		(13) BUDGET ADJUSTMENT REQUIRED? BAR ID Number: { } 4/5 Vote Required { X } N/A	
(14) LOCATION MAP Attached	(15) BUSINESS IMPACT STATEMENT? No	(16) AGENDA ITEM HISTORY { } N/A Date: <u>1-28-14</u>	
(17) ADMINISTRATIVE OFFICE REVIEW Lisa M. Howe			
(18) SUPERVISOR DISTRICT(S) All Districts			

County of San Luis Obispo



TO: Board of Supervisors

FROM: Erica Stuckey, Deputy County Counsel
Mark Hutchinson, Deputy Director Public Works
Kami Griffin, Assistant Director Planning and Building

VIA: Rita Neal, County Counsel
Dave Flynn, Acting Director Public Works
Jim Bergman, Director Planning and Building

DATE: 9/9/2014

SUBJECT: Presentation of options for an ordinance regulating the exportation of groundwater. All Districts.

RECOMMENDATION

Review the options and provide direction on preparation, content and future action for an ordinance regulating the exportation of groundwater.

DISCUSSION

On January 28, 2014, the Board provided direction to staff to continue to look into the technical and legal aspects of an ordinance regulating the exportation of groundwater. Since that time, staff has reviewed the groundwater export ordinances adopted by other counties, as well as developed options for a local ordinance.

This staff report sets forth options for an ordinance regulating the exportation of groundwater underlying the County.

Groundwater Basins

According to the California Department of Water Resources (DWR) Bulletin No. 118 (Bulletin 118), there are twenty two (22) groundwater basins that underlie, either in whole or in part, the County (see map attached as Exhibit A). Bulletin 118 contains descriptions of each delineated groundwater basin in California. In San Luis Obispo County, the twenty two (22) identified basins range from very small basins, such as the San Carpoforo Valley Basin located in the far north coast, to the Paso Robles Area Subbasin, a subbasin of the large Salinas Valley Groundwater Basin that covers an area from Monterey County into northern San Luis Obispo County.

Legal Authority to Regulate

Staff's research has determined that the field of groundwater use is within the municipal police power and that state law does not wholly preclude county regulation of groundwater.ⁱ Thus, the County may enact a local ordinance regulating groundwater subject to the constitutional constraints applicable to all legislation provided that the ordinance does not conflict with the general law.ⁱⁱ More than twenty (20) counties (see Exhibit B) have adopted ordinances regulating the exportation of groundwater; however, there is no appellate case law addressing whether the *specific provisions* of any of these ordinances conflict with the general law.

In recognition of the language of Article X, Section 2 of the California Constitution (“the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they may be capable”) and the common law principle allowing for the export of groundwater from a basin once the basin’s reasonable overlying needs are met, none of the existing ordinances contain a flat prohibition on the exportation of groundwater but rather require a potential exporter to acquire a permit before exporting groundwater.ⁱⁱⁱ The permits range from staff-issued administrative permits to conditional use permits issued by the Planning Commission.

Options for an Ordinance Regulating Groundwater Export

Review of the existing ordinances reveals that most have certain provisions in common. The following summarizes typical sections and notes where direction from the Board is needed.

Findings and declarations – Each ordinance contains a section setting forth certain findings in support of the establishment of an ordinance regulating the exportation of groundwater. For San Luis Obispo County, such findings and declarations would include, without limitation, the importance of groundwater in the County to support both residential and agricultural uses, that three (3) of the County’s basins have been certified as a Level of Severity (LOS) III under the Resource Management System (RMS) and that DWR has identified certain basins within the County as high or medium priority basins as part of the California Statewide Groundwater Elevation Monitoring Program.

Definitions – The definitions section of the ordinance would define a number of terms relevant to the application of the ordinance. For instance, if the Board directs staff to prepare a basin-based ordinance (as discussed below), “groundwater basin” would be clearly defined as those basins identified in Bulletin 118. The ordinance would also define “water year.” This term would be relevant to the implementation of ordinance provisions regarding permit duration and an exemption for de minimis exports (discussed below).

Permit required for exportation of groundwater – This section would describe the type of activity requiring a permit. In other words, it would define what “groundwater export” means for purposes of the ordinance.

The existing ordinances define groundwater export as one of the following:

1. Extraction of groundwater underlying county for use outside county boundaries (county based) (12)
2. Extraction of groundwater from a basin underlying county for use outside of that basin (basin based) (3)
3. Extraction of groundwater underlying county for use outside county boundaries or for use outside of the basin from which it was extracted (county and basin based) (2)
4. Extraction of groundwater underlying parcel within county for use outside of that parcel (parcel based) (3)

Depending on the option selected, the consequences of the ordinance will vary.

A county-based definition would provide the most flexibility but may not address concerns that groundwater from an impacted basin could be exported out of that basin. However, this definition would allow for water from a healthy basin to be used to assist individuals in a basin that is impacted without the need to first go through a permit process while restricting out-of-county transfers.

A basin-based definition would require a permit to bring water from a healthy basin into another basin to assist individuals whose wells are dry or are otherwise not producing enough water.

A parcel-based definition is the most restrictive definition and would prevent a property owner from assisting a neighbor without first obtaining a permit (a de minimis export exemption could mitigate this concern to a degree).

Another option would be to adopt a refined basin-based definition prohibiting export without the benefit of a permit from any groundwater basin that has been certified LOS III under the RMS and/or identified as medium or high priority by DWR. This would allow for the exportation of water from a healthy basin into a distressed basin but not vice versa without the need for a permit.

Direction Required

- How should “export of groundwater” be defined under the ordinance:
 - a) For use outside County
 - b) For use outside of the groundwater basin from which it was extracted
 - c) For use outside County *or* for use outside of the groundwater basin from which it was extracted
 - d) For use off the parcel (or site) from which it was extracted
 - e) For use outside of the groundwater basin from which it was extracted where that groundwater basin has been certified LOS III under the RMS and/or identified as high or medium priority by DWR
 - f) For use outside County *or* for use outside of the groundwater basin from which it was extracted where that groundwater basin has been certified LOS III under the RMS and/or identified as high or medium priority by DWR

Exemptions – Each of the existing ordinances that staff reviewed also contained a number of exemptions. These included items such as preventing floods, preventing the saturation of a root zone for agriculture, discharge of contaminated water, use on contiguous parcels under common ownership (one parcel is located within the county or over the basin) or within the service area of a local agency (part of service area is located within the county or over the basin) consistent with historical practice. Another exemption would be for County or County Flood Control District projects. The Land Use Ordinance currently states that outside of the Coastal Zone, the County is not required to receive county land use permits. Retaining this type of exemption from permitting for County projects would be consistent with past practice.

The Board may want to consider exempting certain de minimis exports from the ordinance. For example, the ordinance could exempt exporters who export less than one (1) acre foot per water year.

Direction Required

- Should the ordinance exempt certain de minimis exports and, if so, what should that amount be

Application for a permit / Procedures for processing – In each case, the existing ordinances define what must be submitted with an application and who would review and make the decision whether to approve, conditionally approve or deny a permit. Although there are many variations in the ordinances as to who has responsibility to review and approve permits, most provide for an administrative determination subject to appeal. For instance, the Public Works Director would make the determination whether to issue the permit and that determination would be appealable to the Board of Supervisors. Locally, the Public Works Director has the benefit of having staff that is familiar with the County's groundwater basins and that has specialized expertise in water. An administrative permit process would involve a noticing requirement, including a request for written comments, but no formal public hearing. The decision would be required to be made available publically in order to provide notice to the applicant or interested persons who may want to appeal the Director's decision.

The export permit would also be subject to the California Environmental Quality Act (CEQA). Individuals requesting water export permits under the ordinance would need to provide the information necessary to complete an Initial Study in order to determine whether the request for the permit is exempt from CEQA or requires the preparation of a Negative Declaration, Mitigated Negative Declaration or Environmental Impact Report. Approval of a water export permit could only occur after completion of an environmental determination by County staff.

Permit findings and conditions required – The existing ordinances all contain required findings for approval that typically involve making a determination that the export would not cause detrimental impacts on the groundwater underlying the county and/or on the groundwater basin and that the export would not adversely affect the health, safety and welfare of property owners in the vicinity of the extraction. It is anticipated that an applicant would need to provide information with the application for a permit in order to support making the required findings. If any of the findings could not be made, the permit would then be denied. Many of the ordinances also allow for specific conditions to be placed on the permit. These could include metering, monitoring and periodic staff review to assure that there has been no violation of the permit and to allow inspections of the site during the life of the permit.

Permit term – Most of the ordinances require the permitting authority to establish the permit term on a case-by-case basis but not to exceed a specified number of years (3, 5 or 10). Other ordinances make the permits subject to annual review by the permitting authority or subject to revocation at any time by the permitting authority if monitoring and reporting show detrimental impacts on groundwater.

The County's ordinance could provide for one of the following:

1. The permitting authority sets the permit term not to exceed a specified number of years with no ability to extend the permit. Once the permit expires, a new permit would be required
2. Same as (1) but the permitting authority can extend the permit a limited number of times for a maximum number of years
3. Have the permit run with the land in perpetuity (no existing ordinance contains this provision although a few ordinances are silent as to term)
4. Add a limitation to any of the above options making the permit subject to annual review by the permitting authority and/or revocation at any time under specified conditions

If ongoing exportation was going to be allowed, then establishing an initial time frame and allowing the permitting authority to grant extension(s) or having the permit run with the land in perpetuity would address long-term exportation. If exportation is to be short term (perhaps to assist with an immediate deficiency), then a permit time frame of between one (1) to three (3) years with no extensions would be more appropriate.

Direction Required

- Should the permit run with the land in perpetuity
- Should the permit be valid for an initial time frame set by the permitting authority not to exceed a specified number of years and be allowed a limited number of permit extensions
- Should the permit be valid for a specific time limit. Once expired, a new permit would have to be requested
- Should options for revocation and/or annual review be included

Notice of violation / Penalty for violation – All the ordinances contain provisions for violation. Remedies typically involve a civil action which would include the ability to impose a fine and/or injunction. The ordinance could also provide that a violation constitutes a misdemeanor.

Ordinance termination date – The ordinance would become effective thirty (30) days after passage consistent with state law. A termination date or “sunset” date could also be established. Adding a section that would terminate the ordinance unless the Board chose to extend it upon review would allow the Board to review the ordinance annually or biennially to determine its effectiveness and use. If your Board determines that the ordinance is no longer necessary, it would simply terminate with no further action required.

Direction Required

- Should the ordinance automatically terminate if not otherwise extended by the Board

Next Steps

If the Board would like staff to proceed with preparation of an ordinance, staff is seeking direction from the Board on what the next steps should be after preparation of a draft ordinance and completion of the environmental review.

Adoption

Prior to adoption, the ordinance would need to be introduced and heard by the Board of Supervisors.

OTHER AGENCY INVOLVEMENT/IMPACT

This information in this staff report was developed with County Counsel, Public Works, Planning and Building and the Administrative Office.

FINANCIAL CONSIDERATIONS

Cost of developing the draft ordinance will be covered by the current County budget.

RESULTS

Providing direction on the contents of a potential ordinance will allow for the preparation of the ordinance in order to introduce and hold public hearings in front of the Board of Supervisors, thereby leading to a well governed community.

ATTACHMENTS

Exhibit A - Map of Groundwater Basins

Exhibit B - List of Counties

ⁱ *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 171, 173

ⁱⁱ *Id.*

ⁱⁱⁱ *Katz v. Walkinshaw* (1903) 141 Cal. 116